COURT OF APPEAL FOR ONTARIO

CITATION: One York Street Inc. v. 2360083 Ontario Limited, 2026 ONCA 176
DATE: 20260311
DOCKET: COA-25-CV-0191

Huscroft, Copeland and Rahman JJ.A.

BETWEEN

One York Street Inc.

Plaintiff/Defendant by Counterclaim (Appellant)

and

2360083 Ontario Limited and LCIL Ltd.

Defendants/Plaintiffs by Counterclaim (Respondents)

Matthew Lerner and Jim Lepore, for the appellant

Matthew Karabus and Luke Sabourin, for the respondents

Heard: October 15, 2025

On appeal from the order of the Divisional Court (Justices Nancy L. Backhouse, Richard A. Lococo and Janet Leiper), dated September 19, 2024, with reasons reported at 2024 ONSC 4272, allowing an appeal from the order of Justice Darla A. Wilson of the Superior Court of Justice, dated August 24, 2023.

Copeland J.A.:

Introduction

[1] This appeal raises the issue of whether the respondents' conduct in litigation gives rise to a deemed waiver of solicitor-client privilege over legal advice received

when they entered into a commercial lease. The motion judge found that it did and ordered production of the file of the respondents' law firm with respect to advice provided at the time of the negotiation and execution of the lease and the lease extension. The Divisional Court found that the motion judge erred in finding a deemed waiver of privilege and quashed the production order. The appellant appeals, with leave, from the order of the Divisional Court.

[2] I would allow the appeal and restore the motion judge's order. I conclude that the Divisional Court made three errors in its analysis. First, it erred in applying a correctness standard of review to the motion judge's analysis of deemed waiver of privilege. Second, it erred in finding that the motion judge based her deemed waiver analysis on the original statement of defence and counterclaim, rather than the amended version – the purported error that the Divisional Court relied on to ground its appellate intervention. Third, it erred in finding that once the respondents' statement of defence and counterclaim was amended, the respondents' defence no longer relied on their purported lack of understanding of their legal position when they entered into the lease.

[3] The motion judge applied the correct legal framework to her analysis of the deemed waiver issue. I see no palpable and overriding error in her finding that the circumstances supported the conclusion that there was a deemed waiver of privilege by the respondents of the legal advice they received in relation to entering into the lease.

I. FACTUAL BACKGROUND

[4] The appellant is a commercial landlord. The respondent 2360083 Ontario Limited ("236") operates a chain of supermarkets under the name "Coppa's Fresh Market". In May 2017, 236 and the respondent LCIL Ltd. entered into a lease with the appellant for premises in a shopping centre in downtown Toronto, with 236 as the tenant and LCIL Ltd. as the indemnifier on the lease.

[5] The respondents' business is a family-run business. Louis Coppa is the sole director of both respondent corporations, as well as the only officer of LCIL Ltd. John Coppa is the President of 236. Louis is John's father.

[6] The lease was for a term of three years, commencing on July 1, 2018. Its terms included four options to renew the lease, for a total of 17 additional years, bringing the total term to 20 years. The lease included a term that the tenant "shall exercise its options to extend for the First Extension Term, Second Extension Term, Third Extension Term and Fourth Extension Term, respectively, contemporaneously with the execution of this Lease". The day after the lease was signed, 236 and LCIL Ltd. entered into a lease extension agreement that extended the lease term to 20 years.

[7] Both the lease and the lease extension were executed by Louis Coppa on behalf of both respondents.

[8] Beginning in 2019, issues arose with the respondents' payment of rent under the lease.

[9] In October 2021, the appellant commenced the claim which underlies this appeal. The appellant alleges that the respondents breached the lease by failing to pay rent and, ultimately, abandoned the leased premises. The appellant seeks unpaid rent and damages for abandonment of the leased premises.

[10] In the respondents' statement of defence and counterclaim, they alleged that they executed the lease and the extension in reliance on misrepresentations by the appellant. In particular, the respondents pleaded that the appellant had misrepresented the amount of foot traffic that would be present in the shopping centre. As I discuss in the analysis section below, the pleading characterized these representations as a "guarantee" and a "promise".

[11] The original statement of defence and counterclaim also specifically pleaded that the respondents "did not understand the ramifications" of the lease extension and that they signed it "without legal advice". I pause to note that the pleading that the respondents signed the lease extension without obtaining legal advice turned out to be untrue. That it was untrue was subsequently admitted in the affidavit of John Coppa filed on the motion leading to this appeal. In fact, at the time they signed the lease and the extension, the respondents received legal advice from Fogler Rubinoff LLP ("Fogler").

[12] The appellant took the position, soon after the statement of defence and counterclaim was served, that the respondents had waived solicitor-client privilege in relation to this legal advice by pleading their state of mind at the time of the lease execution, and in particular, by putting in issue their understanding of their legal rights under the lease. The respondents disputed that the pleading gave rise to a deemed waiver of privilege.

[13] During the examination for discovery of John Coppa, in March 2023, counsel for the appellant asked for documentation from the Fogler file in relation to the negotiation and execution of the lease and the extension and asked questions about legal advice received about the lease at that time. Counsel for the respondents refused answers to these questions on the basis of solicitor-client privilege. The respondents also refused to produce Louis Coppa for discovery as a representative of LCIL Ltd.

[14] The appellant maintained its position that there had been a waiver of privilege in relation to legal advice obtained about negotiation and execution of the lease and the extension. In June 2023, the appellant served a motion seeking, among other relief, production of the Fogler file in relation to the negotiation and execution of the lease and the extension and an order that John Coppa complete his discovery.

[15] Prior to the return of the motion, the respondents discharged Fogler as their counsel and retained Gowlings. In response to the motion, the respondents filed a motion to amend their statement of defence and counterclaim to remove the portions that explicitly pleaded that they did not understand the terms of the lease or the extension and did not receive legal advice at the time of signing the lease extension. The amending motion was granted in late June 2023 as unopposed prior to the production/privilege motion being heard.[1]

[16] The respondents filed an affidavit from John Coppa dated June 19, 2023 on the amending and privilege motions in which he admitted that Fogler acted as counsel for the respondents in 2017 when the lease and the lease extension were signed. In his affidavit, Mr. Coppa admitted that he had reviewed the original statement of defence and counterclaim before it was served. However, he said that he did not recall at that time that the respondents had, in fact, received legal advice from Fogler in respect of the lease extension.

II. DECISIONS BELOW

[17] The motion judge found that privilege was deemed waived and ordered production of the Fogler file relating to the negotiation and execution of the lease and the lease extension. The motion judge summarized the law on waiver of

[1] The June 2023 version of the statement of defence and counterclaim is titled the "Amended Amended Statement of Defence and Counterclaim" because there were previous amendments to the statement of defence and counterclaim. However, the previous amendments are not relevant to the appeal.

solicitor-client privilege. She agreed that solicitor-client privilege is an important substantive right, but noted that it is not absolute: “a solicitor’s file may be produced in certain circumstances.” When determining whether privilege should be deemed to have been waived, the court must consider and balance the advantages of full disclosure to ensure trial fairness against the importance of the privilege. She also identified that the onus is on the party seeking production (the appellant, in this case).

[18] The motion judge applied the two-part analysis for deemed waiver of privilege from *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649, 27 C.P.C. (7th) 172, at para. 30 (discussed in the analysis section of these reasons). Applying the two-part test, the motion judge found that a deemed waiver of solicitor-client privilege occurred in this case. The respondents acknowledged that they received legal advice at the time they entered into the lease and the extension. Even after the June 2023 amendment, their statement of defence and counterclaim included reliance on alleged extra-contractual misrepresentations by the appellant. The alleged misrepresentations included guarantees about the amount of foot traffic in the shopping centre. Since the respondents alleged that they would not have signed the lease had they not relied upon the appellant’s representations, they placed their state of mind in relation to legal advice in issue. The motion judge found that it would be “manifestly unfair” to require the appellant to proceed to trial without having disclosure of Fogler’s file.

[19] The motion judge found that the respondents' withdrawal of the portion of their pleading that explicitly referred to not having received legal advice did not change her conclusion that there was a deemed waiver of privilege. The respondents' amended defence and counterclaim continued to place their state of mind at issue. If the appellant's alleged representations were so fundamentally important that they induced agreement to the lease, the motion judge found it critical to know whether any advice was given to the respondents about those representations at the time.

[20] The Divisional Court allowed the respondents' appeal from the motion judge's order. The Divisional Court held that although the motion judge correctly set out the two-part test for deemed waiver of privilege articulated in *Creative Career*, she erred in applying the test.

[21] The Divisional Court held that the motion judge failed to give effect to the June 2023 amendments to the statement of defence and counterclaim, which removed explicit reference to the respondents not having received legal advice and not understanding the terms of the extension. The Divisional Court held that the motion judge had relied on the unamended pleadings in finding a deemed waiver and that it was an error to rely on the original pleadings rather than the amended pleadings.

[22] The Divisional Court concluded that the respondents effectively removed their reliance on lack of legal advice through the June 2023 amendments to the statement of defence and counterclaim. The analysis of whether there was a deemed waiver of privilege should have been applied to the pleadings in effect at the time of the motion; this was not done. Accordingly, the Divisional Court quashed the order for production.

III. POSITIONS OF THE PARTIES

[23] The appellant argues that the Divisional Court made two errors. First, the appellant argues that the respondents' original statement of defence and counterclaim gave rise to a deemed waiver of privilege and that the June 2023 amendments removing explicit reference to not understanding the terms of the lease extension and not having received legal advice at the time of signing the extension could not "unwaive" the waiver.

[24] Second, the appellant argues that the Divisional Court erred by holding that for a deemed waiver of privilege to exist, the party alleged to have waived privilege must explicitly or expressly avert to legal advice or absence of legal advice in their pleading. Privilege is waived when a party brings an action or raises an affirmative defence that relies on their understanding of their legal position. The appellant argues that imposing a requirement that the pleading must explicitly rely on the lack of legal advice is inconsistent with precedent.

[25] The appellant argues that the amended pleadings still give rise to a deemed waiver of privilege. Legal advice is still material to the issues at trial because the amended pleadings do not withdraw the respondents' counterclaim or amend the relief sought. The remaining allegations continue to seek to set aside the lease on the basis that the respondents did not understand their legal rights, the respondents understood that extra-contractual guarantees would render the lease unenforceable, and the appellant took advantage of the respondents during negotiations. Having made an issue of their state of mind and understanding of an agreement's legal effect, the respondents cannot withhold legal advice from their own counsel about the meaning and effect of that very agreement.

[26] On the first issue, the respondents argue that the jurisprudence supports the position that where privileged information has not yet been disclosed, if the circumstances alleged to give rise to a deemed waiver cease to exist, then the policy/fairness reasons in support of deemed waiver also cease to exist and there is no basis to find waiver. In the circumstances of this case, the respondents argue that the basis for the finding of deemed waiver was removed when the statement of defence and counterclaim was amended in June 2023 to remove the pleading that the respondents did not understand the terms of the lease extension and did not receive legal advice at the time it was executed.

[27] On the second issue, although the respondents resisted the characterization that a party must explicitly rely on legal advice or its absence to give rise to deemed

waiver, their position in oral submissions was very close to saying it must be explicit. The respondents base this position on the second step of the *Creative Career* analysis, which requires reliance by the party who received legal advice in their claim or defence. The respondents further argue that a party putting in issue their state of mind in a general sense in their claim or defence is not a basis to find deemed waiver.

[28] The respondents argue that the amended statement of defence and counterclaim does not rely on the existence or absence of legal advice. The fact that the respondents may have received legal advice at the time of the negotiation and execution of the lease and extension does not result in waiver.

IV. ANALYSIS

[29] I begin with a summary of my conclusion. The motion judge applied the correct legal framework to her analysis of whether there was a deemed waiver and her findings of fact and application of the law to the facts disclose no palpable and overriding error. The respondents pleaded that in entering into the lease, they relied on extra-contractual representations made by the appellant guaranteeing a certain level of foot traffic in the shopping centre. This pleading placed reliance on the respondents' understanding of their legal position under the lease. It is common ground that the respondents received legal advice at the time of the negotiation and execution of the lease and the extension. Allowing the respondents to maintain privilege over the legal advice they received from their own lawyers at

the time they entered into the lease would be inconsistent with their reliance in their statement of defence and counterclaim that the alleged misrepresentations by the appellant affected their understanding of their legal rights under the lease.

[30] The motion judge concluded that, even after the statement of defence and counterclaim was amended in June 2023 to remove express reference to the respondents not understanding the lease extension and not receiving legal advice when it was executed, it still pleaded that the respondents relied on alleged misrepresentations by the appellant as to guarantees of foot traffic that affected the respondents' understanding of their legal rights under the lease.

[31] Because I find that the motion judge concluded that the statement of defence and counterclaim gave rise to a deemed waiver of privilege even after the June 2023 amendments, it is not necessary for me to consider the appellant's argument that, assuming the references in the original statement of defence and counterclaim to not understanding the lease extension and not receiving legal advice gave rise to a waiver of privilege, that waiver could not be "unwaived" by amending the pleadings.

1. Legal principles applicable to waiver of solicitor-client privilege

[32] Solicitor-client privilege is fundamental to the operation of our legal system. The privilege protects the right of a client to seek and obtain legal advice. In order to obtain legal advice, a client must be able to communicate freely and fully with

their counsel for the purpose of obtaining advice, secure in the knowledge that the communications will not be divulged without their consent: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 833-35; *Smith v. Jones*, [1999] 1 S.C.R. 455, at paras. 45-50; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 26.

[33] The privilege is not absolute. But this case does not concern exceptions to privilege; rather, it concerns when privilege will be treated as being waived by the client.

[34] Solicitor-client privilege can be waived. As with any claim of waiver of privilege, the burden to establish waiver rests on the party claiming there has been a waiver of solicitor-client privilege: *Smith v. Jones*, at para. 46.

[35] There are two types of waiver: express waiver and deemed or implied waiver. I use the term deemed waiver throughout these reasons.

[36] An express waiver arises where the privilege holder knows of the existence of the privilege and voluntarily conveys their intention to waive it: Matthew Gourlay et al., *Modern Criminal Evidence*, ed by Brian H. Greenspan & Vincenzo Rondinelli (Toronto: Emond, 2022), at p. 497; David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at p. 292.

[37] By contrast, deemed waiver does not require that the holder intend to waive privilege. Deemed waiver will be established when a party's conduct of litigation is

inconsistent with an intention to maintain confidentiality: Gourlay, at p. 497; Paciocco, at p. 293; *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38, 434 D.L.R. (4th) 521, at para. 51, leave to appeal refused, [2019] S.C.C.A. No. 214.

[38] This appeal involves an allegation of deemed waiver of privilege. For this reason, I turn now to more detail on what is required to establish deemed waiver.

[39] Wigmore explains the conceptual basis for deemed waiver as follows. In deciding whether there is a deemed waiver of privilege,

> regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon [privilege] could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

See John T. McNaughton, *Wigmore on Evidence*, vol. 8 (Boston: Little, Brown and Company, 1961), §2327 at p. 636.

[40] The “voluntary intention” or “implied intention” referred to by Wigmore and in the deemed waiver jurisprudence does not require an intention to waive privilege. Rather, it refers to the voluntary decision by a party to rely on the receipt of legal advice as part of their claim or defence or to rely on their understanding

(or lack of understanding) of their legal position as part of their claim or defence: *Creative Career*, at para. 29; *S. &. K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.), at para. 10; *Nova Scotia v. Cameron*, at para. 61; Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022), at paras. 14.168-14.170. Where a party has voluntarily relied in their claim or defence on receipt of legal advice or their understanding of their legal position, that reliance gives rise to a deemed waiver of privilege because it would create an unfair litigation advantage to allow the party to inject their understanding of their legal position into the claim or defence while shielding legal advice that bears on those assertions. The party's reliance on legal advice, or on their understanding (or lack of understanding) of their legal position when they, in fact, received legal advice on the relevant issue, is inconsistent with maintaining privilege over that advice.

[41] In *Creative Career*, Perell J. framed the analysis as follows, at para. 30:

> Thus, a deemed waiver and an obligation to disclose a privileged communication requires two elements; namely: (1) the presence or absence of legal advice is relevant to the existence or non-existence of a claim or defence; which is to say that the presence or absence of legal advice is material to the lawsuit; and (2) the party who received the legal advice must make the receipt of it an issue in the claim or defence.

[42] The second branch carries the weight of the analysis, as Perell J. went on to emphasize at para. 31 of *Creative Career*:

> Waiver does not occur because the party discloses that he or she received legal advice, nor does it occur because the party admits that he or she relied on the legal advice; it occurs because the party chooses to use the legal advice as a substantive element in his or her claim or defence.

[43] The requirement of reliance on legal advice or the absence of legal advice is also explained in Paciocco, at p. 293:

> The issue of implied waiver often arises when one party puts their state of mind into issue and explains that state of mind by mentioning the legal advice they may or may not have received – for example, by claiming to have signed an agreement without legal advice when there is evidence that they in fact obtained advice, or by alleging that they acted in good faith upon the advice of legal counsel. [Emphasis added.]

[44] Relevance alone is not sufficient to overcome the protection of solicitor-client privilege. If it were, the privilege would have no substance: see for example *R. v. Dosanjh*, 2022 ONCA 689, 163 O.R. (3d) 401, at paras. 150-52. In other words, by its nature, the doctrine of solicitor-client privilege protects otherwise relevant information from disclosure because of countervailing values, in particular, the need for parties to litigation to be able to speak freely to counsel to obtain legal advice: Paciocco, at pp. 287, 298; Gourlay, at pp. 483, 485-86.

[45] The assessment of whether a party has relied on legal advice or their understanding (or lack of understanding) of their legal position such that consistency and fairness require it be treated as a deemed waiver of privilege is necessarily a case-specific analysis. This is so because the analysis is based on a party's conduct of the litigation, the nature of the legal claims and defences and factual basis for them, and whether in the particular circumstances it would be unfair to maintain the privilege because the party's actions are inconsistent with maintaining the privilege: Gourlay, at p. 497; Paciocco, at pp. 292-93; *Roynat Capital Inc. v. Repeatseat Ltd.*, 2015 ONSC 1108, 125 O.R. (3d) 596 (Div. Ct.), at para. 84.

[46] Much of the jurisprudence in relation to deemed waiver of privilege considers situations where a party relies on the fact that they received legal advice as an aspect of their claim or defence. Usually, where a party is relying on the fact of having received legal advice as part of their claim or defence, they do so expressly.

[47] This appeal, by contrast, involves circumstances where it is argued that the respondents relied in their defence and counterclaim on a lack of understanding of their legal position, but in fact, had received legal advice. As a result, there is no express reliance by the respondents on having received legal advice. Further, after the June 2023 amendments to the statement of defence and counterclaim, there is no express statement in the respondents' pleadings to not understanding the lease extension and not having received legal advice. Consequently, the issue is

whether the respondents' defence and counterclaim asserts a lack of understanding of their legal position at the time they signed the lease and extension, and if so, whether that position gives rise to a deemed waiver in relation to legal advice received at that time.

[48] In my view, the same principles apply in circumstances where a party: (i) relies on receipt of legal advice about an issue in the litigation as an element of their claim or defence; or (ii) relies on their lack of understanding of their legal position about an issue in the litigation as an element of their claim or defence, but they, in fact, received legal advice on that issue at the relevant time.

[49] Both situations involve a party relying in their claim or defence on their state of mind or knowledge in relation to their understanding of their legal position about an issue in the litigation. It is this reliance by a party on their state of mind in relation to their understanding of their legal position that gives rise to a deemed waiver of privilege as a matter of consistency and fairness. This is because a party who injects their understanding of their legal position into a case by relying on it in their claim or defence cannot then shelter legal advice which might be used to challenge their assertions about their understanding of their legal position.[2]

[2] Adam M. Dodek makes a similar point in *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at §7.131: "When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice. To displace the privilege there must be an affirmative allegation that puts the party's state of mind in issue by the privilege-holder. Simply putting state of mind at issue without reliance on legal advice does not suffice for waiver." Implicit in this formulation is a requirement that the state of mind that the party places in issue relates to their understanding of their legal position.

[50] Three cases help illustrate this point.

[51] The first case is *Rogers v. Bank of Montreal* (1985), 62 B.C.L.R. 387 (C.A.). *Rogers* was cited with approval by the Supreme Court in *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 69. In *Rogers*, the bank put a defaulting customer into receivership. The customer sued both the bank and the receiver. The bank and the receiver launched third-party proceedings against each other. The bank claimed it relied on advice from the receiver in putting the customer into receivership. The receiver denied detrimental reliance on its advice and argued that it was entitled to know what other professional advice the bank had received at the relevant time, and in particular, what legal advice the bank had received from its own lawyers when it put the customer into receivership. The British Columbia Court of Appeal rejected the bank's claim of solicitor-client privilege. In relying on a defence that its decision to put the customer into receivership had been made based on legal advice provided by the receiver, the bank voluntarily injected the issue of its legal knowledge at the relevant time into the case.

[52] Justice Binnie, writing for the court in *Campbell*, summarized the holding in *Rogers* as follows:

> It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of reliance, <u>even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors</u>. [Emphasis added.]

[53] Thus, in *Rogers*, there was a deemed waiver of privilege of the bank's legal advice from its own lawyers because the bank chose to rely in its defence on an asserted lack of understanding of its legal position induced by its reliance on the receiver's advice regarding legal matters. Despite the bank not having relied on or referred to its own legal advice, the pleading of reliance on other legal advice in circumstances where the bank also had its own legal advice, gave rise to a deemed waiver of privilege over its own legal advice.

[54] The second case is *Roynat*. In *Roynat*, the litigation arose out of a financial transaction in which the plaintiffs loaned money to the defendant corporation on certain conditions. One of the conditions required the defendant corporation to raise additional equity funds before the loan funds were advanced. The plaintiffs also sued the law firm who had acted for the corporate defendant on the transaction, alleging negligent misrepresentation. The plaintiffs claimed that a lawyer at the firm confirmed to them that the equity fund condition had been met, and that the plaintiffs relied on that representation in advancing the loan funds. At his examination for discovery, the representative of the plaintiffs refused to answer questions about the advice the plaintiffs received from their own lawyers about the alleged confirmation of the equity fund condition.

[55] The Divisional Court upheld the finding by the motion judge (reversing the decision of an associate judge) that the plaintiffs' allegation of reliance on a representation by the defendant corporation's law firm gave rise to a deemed

waiver of privilege regarding legal advice from the plaintiffs' own lawyers about the confirmation of the equity fund condition. By pleading reliance on the alleged confirmation of the equity fund condition by the defendant's law firm, the plaintiffs put in issue their state of mind in relation to their legal position about the confirmation. Maintaining privilege over legal advice that the plaintiffs received from their own lawyers about whether the equity fund condition had been satisfied would be inconsistent with the plaintiffs' assertion that they relied on the defendant's law firm's representation because, if the plaintiffs' own lawyers provided them with legal advice on the same issue, their reliance on the defendant's law firm's alleged confirmation would not be reasonable: see, in particular, at paras. 58-59.

[56] A deemed waiver was found in *Roynat* despite the plaintiffs not pleading reliance on their own legal advice because they relied in their claim on their state of mind with respect to their legal position. Allowing the plaintiffs to shield their own legal advice on the issue of the equity fund confirmation would be unfair to the defendant law firm and inconsistent with the plaintiffs' claim that it relied on a representation from that firm.[3]

[3] The *Roynat* decision discusses in some detail the decisions of *Lloyds Bank Canada v. Canada Life Assurance Co.* (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.), *per* Van Camp J., and *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1997), 32 O.R. (3d) 575 (Gen. Div.), *per* Winkler J., as he then was, which reached the same conclusion.

[57] The third case is *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, 90 B.C.L.R. (5th) 318. In *Soprema*, the plaintiff sued the defendant, an auditor, for negligent misrepresentation. The plaintiff alleged that the defendant made false representations about the accuracy of certain financial statements that the plaintiff relied on in deciding whether to purchase shares in a company. A required element of the plaintiff's claim of negligent misrepresentation was that the plaintiff reasonably relied on the defendant's misrepresentations. The defendant denied that the plaintiff relied on its representations and that any reliance was reasonable. The defendant argued that the plaintiff had waived privilege over the legal advice it received in relation to the share purchase by putting its state of mind in issue.

[58] In the result, the British Columbia Court of Appeal found there was not a waiver of privilege. The factual basis for this conclusion is important. The plaintiff had put in issue its state of mind in a general sense by pleading negligent misrepresentation because reasonable reliance on the representation is an element of that cause of action. However, it was common ground between the parties that the plaintiff had not pleaded reliance on the defendant for legal advice or that the representations by the defendant had affected the plaintiff's understanding of its legal position: at para. 6. The Court of Appeal held that there was no waiver because the plaintiff's reliance on state of mind in general (arising from the pleading of negligent misrepresentation) was not sufficient to ground a

deemed waiver of privilege in the absence of the plaintiff putting in issue its state of mind in relation to legal advice or its understanding of its legal position.

[59] The reasoning of the court in *Soprema* is helpful on the distinction between a party putting in issue their state of mind in a general sense and putting in issue their state of mind regarding their understanding of their legal position about an issue in the litigation at the relevant time. The former does not suffice to ground a deemed waiver. Only reliance on state of mind in relation to a party's understanding of their legal position can ground a deemed waiver of privilege. Harris J.A. stated the principle as follows, at para. 28:

> I am of the view it is apparent that the cases which actually find waiver typically involve a party voluntarily making its own understanding of the law, or its reliance on legal advice it received, a material issue…. Indeed, on my review of the cases, there is a weighty argument that underlying the reasoning in those cases is the view that a party will impliedly waive privilege only if it has voluntarily put in issue its understanding of its legal position. It is in those circumstances that it would be inconsistent with the conduct of the party to maintain privilege and unfair to do so, because in those circumstances maintaining privilege would indeed confer an "unfair" litigation advantage. [Emphasis added.]

[60] In sum, the issue that a court assessing a claim of deemed waiver must consider is not whether a party has expressly or explicitly referred to legal advice or the absence of legal advice in a pleading or some other step in a proceeding. Rather, the question is whether the party relies in its claim or defence on its

understanding of its legal position. Although such reliance is likely to be easier to see where a party expressly or explicitly relies on the receipt of legal advice, the reliance need not be express. If a party relies in its claim or defence on its state of mind or understanding (or lack of understanding) with respect to its legal position about an issue in the litigation and it obtained legal advice on that issue at a time relevant to its asserted state of mind, then as a matter of fairness, the party's choice to rely on its understanding or lack of understanding of its legal position makes it inconsistent and unfair for the party to maintain privilege over legal advice received regarding the issue on which it injected its understanding of its legal position into the litigation.

[61] I note that some of the jurisprudence on deemed waiver refers to a party "putting its state of mind in issue" as shorthand for a party relying in its claim or defence on its state of mind in relation to its legal position. The motion judge used similar shorthand in places in her reasons. There is nothing wrong with such shorthand, but one must not lose sight of the legal principle: a party putting in issue their state of mind in some general sense does not give rise to a deemed waiver. Rather, what is required is that the party put in issue in their claim or defence their state of mind with respect to their legal position about an issue in the litigation.

[62] Some passages of the Divisional Court reasons could be read as suggesting that for a party to put in issue its state of mind in relation to its legal position such that it can give rise to a deemed waiver of privilege, the party must do so explicitly.

It is not clear that the Divisional Court was stating an “explicitness” requirement as a matter of law. It may be that the Divisional Court’s references to “explicit” reliance on legal advice or the absence of legal advice were simply addressing the factual matrix in this case – that after the pleading was amended, it no longer contained an explicit reference to the respondents not understanding the lease extension and not having obtained legal advice prior to signing it. In any event, for the reasons explained above, it is not a necessary requirement for deemed waiver of privilege that the party alleged to have waived privilege explicitly refer to legal advice or the lack of legal advice in a pleading or other step in litigation. What is required is that the party rely on their understanding of their legal position as an element of their claim or defence.

2. The standard of review

[63] The Divisional Court applied a correctness standard of review, stating: “Issues of relevance and the determination of questions of privilege are questions of law”. In support of this conclusion, the Divisional Court cited one of its previous decisions and a decision of the Superior Court: *Laliberté v. Monteith*, 2021 ONSC 4133, 155 O.R. (3d) 596 (Div. Ct.), at para. 24; *Magnotta Winery Corporation v. Ontario (The Alcohol and Gaming Commission)*, 2020 ONSC 561, at para. 21. Neither of the decisions contains any analysis beyond stating that questions of privilege are questions of law.

[64] Respectfully, the Divisional Court erred in applying a correctness standard of review to the motion judge's deemed waiver analysis. The Divisional Court and Superior Court authorities relied on by the Divisional Court on the standard of review are not consistent with the approach required by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 33, 36.[4]

[65] Questions of law are reviewable on a standard of correctness. Questions of fact are reviewable on a standard of palpable and overriding error. Questions of mixed fact and law lie along a spectrum: *Housen*, at paras. 33, 36. Applying a legal standard to a set of facts involves a question of mixed fact and law: *Housen*, at para. 26. For questions of mixed fact and law, an appellate court must determine which standard of review applies: *Housen*, at para. 27.

[66] Where an error in respect of a question of mixed fact and law can be attributed to the application of an incorrect legal standard, a failure to consider a required element of the applicable legal test, or a similar error in principle, this amounts to an error of law and is reviewable on a correctness standard: *Housen*, at paras. 33, 36. However, where a legal principle is not readily extricable, then the matter is one of mixed fact and law and should not be overturned absent palpable and overriding error: *Housen*, at para. 36.

[4] If one traces back to the authority cited in the *Magnotta* decision, *Leadbeater v. Ontario* (2004), 70 O.R. (3d) 224 (S.C.), at para. 29, it appears the source of the erroneous application of a correctness standard to questions of solicitor-client privilege is the reliance in *Leadbeater* on pre-*Housen* decisions without consideration of whether *Housen* affected the analysis.

[67] As I explain below, a question of whether a deemed waiver of privilege has occurred is an issue of mixed fact and law. Applying *Housen* leads to the following conclusion about the standard of review. Whether the motion judge applied the correct legal standard or test for deemed waiver of privilege is reviewable on a correctness standard. If a motion judge applied the correct legal standard, their findings of fact are entitled to deference. The findings of fact and ultimate conclusion of whether a deemed waiver has occurred are reviewable on the palpable and overriding error standard.

[68] In *R. v. Delchev*, 2015 ONCA 381, 126 O.R. (3d) 267, this court considered the standard of review applicable to an issue of whether settlement privilege applied to certain communications. The court described the standard of review as follows, at para. 23:

> The question of whether evidence is privileged involves the identification of legal principles, and the application of those principles to the facts as drawn from the evidence. The trial judge's identification of the applicable legal principles will be assessed on a correctness standard, though deference is owed to her application of those principles to the facts[.]

[69] In my view, the same standard of review applies to whether there has been a waiver of solicitor-client privilege.

[70] The appropriateness of the application of the palpable and overriding error standard of review is particularly clear with respect to questions of whether a

deemed waiver of solicitor-client privilege has occurred. As I have outlined above, the jurisprudence is clear that the analysis requires a case-specific assessment of all of the circumstances. Gordon D. Cudmore aptly describes why the mixed fact and law palpable and overriding error standard of review is appropriate to issues of deemed waiver in the *Civil Evidence Handbook*, release no. 1 (Toronto: Thomson Reuters, 2026), at §6:36:

> The question of whether privilege has been implicitly waived requires identification of matters of substance by reference to the material facts and the law that governs the client's claim or defence, as well as an examination of considerations of fairness and consistency, and any litigation advantage that may arise from the enforcement of the privilege. That assessment takes place in the context of the legal standards that govern the rule of solicitor-client privilege. Thus, whether there has been an implied waiver of privilege is a question of mixed fact and law, reviewable on a standard of palpable and overriding error[.]

[71] Although the decisions of appellate courts across Canada are not uniform, several appellate courts have concluded that the palpable and overriding error standard of review applies in appellate review of the application of the law of privilege to particular documents or communications: *Nova Scotia v. Cameron*, at paras. 26-27; *Thomson v. University of Alberta*, 2013 ABCA 391, 561 A.R. 391, at para. 11; *The Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112,

487 A.R. 71, at para. 12; *R. v. Matthews*, 2022 ABCA 115, 413 C.C.C. (3d) 178, at para. 33; *Girouard v. Canadian Judicial Council*, 2019 FCA 252, at para. 15.[5]

[72] In sum, while a judge at first instance must apply the correct legal principles to the assessment of whether there has been a deemed waiver of privilege, their findings of fact that are the basis of a finding that a deemed waiver has or has not occurred are entitled to deference.

[73] I would add that in this case, the motion judge was particularly well-placed to make the case-specific factual findings required for the deemed waiver analysis. The motion judge was also the case management judge. Her ongoing supervision of this case placed her in an advantageous position to engage in the case-specific assessment of whether there was a deemed waiver of privilege by the respondents.

3. The motion judge did not err in finding a deemed waiver of privilege

[74] The alleged error on which the Divisional Court grounded its appellate intervention was its conclusion that the motion judge found that privilege was waived based on the original statement of defence and counterclaim, which pleaded that the respondents did not receive legal advice at the time of signing the

[5] Authorities in British Columbia reach a contrary position: *Do Process LP v. Infokey Software Inc.*, 2015 BCCA 52, 382 D.L.R. (4th) 698, at para. 19; *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 205, at paras. 17-19, leave to appeal refused, [2019] S.C.C.A. No. 322. However, I note that in both of these cases the British Columbia Court of Appeal reached the conclusion that the applicable standard of review was correctness on the basis that the only material facts in the record consisted of the parties' pleadings. By contrast, in this case, the record of the respondents' conduct in the litigation that the motion judge appropriately relied on to find a deemed waiver of privilege extended beyond the pleadings.

lease extension and did not understand its terms, and that the respondents could not “unwaive” the privilege by amending the pleading to remove the explicit references to not having obtained legal advice.

[75] Respectfully, I do not read the motion judge’s reasons in the same way as did the Divisional Court.

[76] Because I am of the view that the Divisional Court erred both in its approach to the standard of review and in finding that the motion judge assessed the issue of privilege based on the original pleading rather than the amended pleading, it falls to this court to assess, using the proper standard of review, whether the motion judge erred in finding that the respondents’ conduct in the litigation gave rise to a deemed waiver of privilege of the legal advice they received at the time they entered into the lease and the extension. In other words, did the motion judge apply the correct legal framework for deemed waiver? If she did, is there any palpable and overriding error in her findings of fact or her application of the law to the facts?

[77] As I will explain, the motion judge applied the correct legal framework and made no palpable and overriding error in her factual findings and her application of the law to the facts.

[78] The motion judge applied the correct legal framework to her assessment of whether there was a deemed waiver. She recognized the importance of solicitor-

client privilege to the operation of the legal system. She recognized that privilege may be waived, expressly or by implication, and that the onus is on the party alleging waiver to establish that there has been a waiver. In considering whether there was a deemed waiver of privilege in this case, she correctly outlined the applicable law as stated in *Creative Career* and *Roynat*. Her analysis correctly focused on the question of whether the respondents had placed reliance in their statement of defence and counterclaim, and in their conduct of the litigation, on their state of mind with respect to their legal position by pleading that they relied on representations by the appellant not contained in the lease as "guarantees".

[79] Further, the motion judge's findings of fact and her application of the law to the facts disclose no palpable and overriding error.

[80] The crux of the motion judge's finding was that the respondents pleaded that they relied on alleged misrepresentations by the appellant, in particular about the amount of foot traffic in the shopping centre, that were not in the lease contract, but which the respondents asserted were "guarantees". In taking this position, the respondents placed reliance in their defence on their understanding of or state of mind about their legal position under the lease.

[81] By the time the motion was heard, it was not in dispute that the respondents had received legal advice when they entered into the lease and the extension. The motion judge found that the respondents "admitted" that they received legal advice

from Fogler to negotiate a lease that was significant to them because it was for a large premises and extended for 20 years. She found: “Counsel was retained clearly to ensure that the [respondents] understood the implications of the terms being negotiated and to ensure that the transaction encompassed the agreed-upon terms.”

[82] In light of the position taken by the respondents in their pleading placing reliance on their understanding of their legal rights under the lease, and the fact that they had received legal advice at the time they entered into the lease, they placed in issue the legal advice they received.

[83] In places in her reasons, the motion judge refers to the respondents placing their “state of mind” at issue in their defence and counterclaim, without specifying that she is referring to their state of mind in relation to their legal position. As noted above, this shorthand is found in the jurisprudence (see, for example, *Roynat*). However, read as a whole, and particularly in the context of the motion judge’s correct statements of the law from *Creative Career* and *Roynat*, the reasons are clear that the motion judge’s references to the respondents’ “state of mind” refer to their state of mind with respect to their understanding of their legal position under the lease.

[84] The record supports the motion judge’s conclusion that the respondents placed reliance in their statement of defence and counterclaim on their state of

mind with respect to their understanding of their legal position under the lease by pleading that the appellant had guaranteed a certain level of foot traffic.

[85] While the June 2023 amendments to the statement of defence and counterclaim removed express reliance on not receiving legal advice and the express assertion that the respondents did not understand the terms of the lease extension, the remaining pleadings still place reliance on the respondents' understanding of their legal position.

[86] The misrepresentations pleaded by the respondents are not merely factual. Rather, a significant component of the defence and counterclaim is the assertion that the appellant landlord made guarantees or promises about the amount of foot traffic in the shopping centre. These are allegations of legal representations – that the landlord would guarantee a certain amount of foot traffic. As the motion judge noted, they are allegations of "extra-contractual representations". These allegations place reliance on the respondents' understanding of their legal position under the lease and the lease extension.

[87] Having made these assertions, and in circumstances where it is undisputed that the respondents received legal advice from their own counsel at the time they entered into the lease and the extension, allowing the respondents to maintain privilege over the legal advice they received at the time the lease and the extension were negotiated and executed would be inconsistent with the position they have

taken in the litigation – putting in issue their understanding of their legal position – and would be unfair to the appellant.

[88] If there were any doubt that the respondents' position is that the appellant guaranteed a certain level of foot traffic in the shopping centre as a term of the lease, it is resolved by the answers of John Coppa during his examination for discovery. His answers are clear that the respondents' position is not merely one of factual misrepresentations about the amount of foot traffic in the shopping centre; rather, it is an assertion that the appellant made "guarantees" of a certain level of foot traffic through the mall through representations outside the written lease. Consistent with the position in the statement of defence and counterclaim, these answers assert and rely on an understanding of the respondents' legal position under the lease – that the appellant guaranteed a certain level of foot traffic in the shopping centre. This places in issue the respondents' state of mind regarding their understanding of their legal position.

[89] I emphasize, as did the motion judge, that it is not the case that every pleading of misrepresentation gives rise to a deemed waiver of privilege. As noted in *Soprema*, at para. 18, a pleading of misrepresentation puts in issue the state of mind of the party pleading it, but not necessarily their state of mind with respect to their legal position. It is only a pleading of misrepresentation that places in issue a party's state of mind with respect to their understanding of their legal position that gives rise to a deemed waiver of privilege: *Campbell*, at para. 69; *Soprema*, at

paras. 28, 49. The respondents did so here by pleading that in entering into the lease and the extension, they relied on representations by the appellant as guaranteeing a certain level of foot traffic in the shopping centre.

[90] The Divisional Court justified its appellate intervention on the basis that the motion judge relied on the version of the statement of defence and counterclaim before the June 2023 amendments, and erred in so doing. Respectfully, this conclusion rests on a misreading of the motion judge's reasons.

[91] The motion judge considered both versions of the statement of defence and counterclaim in her analysis. While the respondents' pleading that they did not understand the terms of the lease and the extension was clearer and more explicit before the June 2023 amendments (and also incorrectly claimed they had not received legal advice), the motion judge's reasons show that she concluded that the June 2023 amendments to the defence and counterclaim did not entirely remove from the pleadings the respondents' reliance on assertions about their understanding of their legal position under the lease:

> The [respondents'] withdrawal of the pleading alleging they did not have the benefit of legal advice when they signed the lease does not assist them with preserving solicitor-client privilege. They have placed their state of mind at issue in their defence and the legal advice they received from their lawyer at that time is relevant and it would be unfair to require the [appellant] to proceed to trial without having disclosure of the file from Fogler's.

[92] I acknowledge that near the end of her reasons, the motion judge stated that the respondents could not attempt to “unwaive” privilege by amending the pleading. In doing so, she was addressing an argument made below and in this court by the appellant. However, the motion judge’s reasons as a whole are clear that the basis on which she found deemed waiver was that the substance of the respondents’ defence and counterclaim relied on their state of mind with respect to their understanding of their legal position under the lease by asserting that they relied on alleged extra-contractual misrepresentations by the appellant guaranteeing a certain level of foot traffic in the shopping centre. Even after the June 2023 amendments, the respondents’ pleading still alleges that the respondents did not understand the terms of the lease. Having taken that position, which asserted a certain understanding of their legal position, the respondents could not shield legal advice they received at the time of entering into the lease.

[93] Because I conclude that the motion judge did not err in finding a deemed waiver of privilege based on the conduct of the respondents in the litigation and the amended statement of defence and counterclaim, it is not necessary to consider the appellant’s argument that if the original pleading gave rise to a deemed waiver of privilege, the waiver could not be undone by amending the pleading.

4. Summary of legal principles

[94] Consideration of whether there has been a deemed waiver in the context of a party placing reliance on their state of mind with respect to their legal position can be difficult. Professor Dodek notes: "'State of mind' is the most confusing area of implied waiver jurisprudence": at §7.131.

[95] I provide the following summary to assist motion and trial judges considering such claims at first instance.

(1) The fact that a party has received legal advice on an issue relevant to the claim or defence does not give rise to a deemed waiver of privilege. Nor does the fact that a party received legal advice at the time they entered into a contract.

(2) An allegation of misrepresentation or a party putting their state of mind in issue in a general sense does not give rise to a deemed waiver of privilege.

(3) For a deemed waiver to arise, a party must place reliance in its claim or defence on its understanding (or lack of understanding) of its legal position about an issue in the litigation. This type of reliance places in issue a party's state of mind about its legal position.

(4) In the specific circumstances of a party placing reliance on its state of mind about its understanding of its legal position on an issue in the

litigation and where the party obtained legal advice on that issue at a time relevant to its asserted state of mind, the party's choice to rely on its understanding or lack of understanding of its legal position makes it inconsistent and unfair for the party to maintain privilege over legal advice received regarding the issue on which it injected its understanding of its legal position into the litigation.

(5) The burden to establish waiver rests on the party claiming there has been a waiver.

Disposition

[96] I would allow the appeal and restore the order of the motion judge. As agreed by the parties, the appellant is entitled to costs of the appeal, including the motion for leave to appeal, in the amount of $35,000, inclusive of applicable taxes and disbursements.

Released: March 11, 2026 "G.H."

"J. Copeland J.A."
"I agree. Grant Huscroft J.A."
"I agree. M. Rahman J.A."